COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS & ENERGY

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Rulemaking by the Department of Telecommunications)

and Energy, pursuant to 220 CMR §§ 2.00 *et seq.*,)

to promulgate regulations governing an expedited dispute) D.T.E. 00-39

resolution process for complaints involving competing)

telecommunications carriers as 220 CMR §§ 15.00 *et seq.*)

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COMMENTS ON PROPOSED REGULATIONS 220 C.M.R. §§ 15.00 *ET SEQ.* "ACCELERATED DOCKET FOR DISPUTES INVOLVING COMPETITIVE TELECOMMUNICATIONS CARRIERS" BY RNK, INC.

INTRODUCTION

RNK Inc., d/b/a/RNK Telecom ("RNK") is a registered Competitive Local Exchange Carrier ("CLEC") in the Commonwealth of Massachusetts offering residential and business telecommunications services through its own facilities, and via resale. RNK strongly supports the Massachusetts Department of Telecommunications and Energy ("DTE") adoption of regulations creating an accelerated docket option for speedy resolution of carrier disputes in the Commonwealth.

- NEED FOR AND BENEFITS OF AN ACCELERATED DOCKET

The Federal Communications Commission ("FCC"), in ordering the promulgation of federal Accelerated Docket regulations, 47 C.F.R. §§ 1.730 *et seq.* ("FCC

regulations"), acknowledged the necessity and benefits of an expedited process to resolve disputes in the telecommunications industry. To that end, in its *Second Report and Order*, the FCC stated that "[B]y increasing competition in the market for telecommunications services, the Accelerated Docket will ultimately redound to the benefit of consumers in the form of lower prices and a broader range of available services." FCC, *In the Matter of Implementation of the Telecommunications Act of 1996, CC Docket No. 96-238, amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers, SECOND REPORT & ORDER (1998)* ("FCC Order"), ¶7. Indeed, "the mere availability of such an accelerated process may sufficiently change the dynamic in competitor negotiations that those seeking to enforce their rights under the Act will obtain better results without actually resorting to the formal complaint process." *FCC Order*, ¶8. RNK agrees and accordingly, supports the proposed regulations. As discussed below, RNK believes that for the Department to achieve these ultimate goals, the accelerated process need adhere to a stringent discipline and specificity which avoids any indefinite elasticity or loopholes that might hinder its own purposes.

II. THE PROPOSED REGULATION OF REQUESTS FOR EXPEDITED REVIEW, § 15.03, CONTENTS ARE UNDULY VAGUE IN PARTS TO THE POTENTIAL DETRIMENT OF EITHER PARTY AND/OR THE DEPARTMENT

As the Department's presumable intent in adding (to the FCC regulations) proposed §15.03 (4), detailing required elements for a request for inclusion on the Accelerated Docket, would be to assist and facilitate the Department's determination of a matter as suitable for accelerated process, the inclusion of elements more parallel with the actual acceptance criteria employed, at proposed § 15.04(2), may be more helpful. Parallel elements may likely include the various informational elements proposed, yet, at this proposed point in the process, the Department and the parties may benefit more from disclosure and demonstration of the matter's suitability for acceleration. Broadening the elements would enhance the Department's ability to assess a case, and would provide greater balance among requests by both complainants and respondents. Further, permitting and defining variances in lists submitted by between complainants and respondents, might better illuminate their likely different suitability allegations, viz the acceptance criteria, and may be more efficient at this stage of the process, rather than later.

While Subsection (4) of proposed §15.03 appears to apply equally to requests for inclusion on the Accelerated Docket on the parts of either the complainant or the respondent, the request elements outlined in Subsection (4) appear to be more geared toward a request from a complainant and, accordingly, leaves open a possible and unnecessary discrimination in the possible applications of §15.03, Subsection (4). The requisite contents of the requests appear to mirror a summary

of a Complaint. Accordingly, should the party requesting acceleration be the respondent, it may be less productive, for example, to require such items as "(c) why the action or inaction is unjust or unreasonable;" or "(h) the specific relief requested." A respondent's request may better assist the Department, again, by addressing more specifically the acceptance criteria themselves. More troublesome, issues such as "(e) financial impact," may be less fairly or meaningfully discussed if from a single, responding, party's view.

Also relative to best assisting the Department in satisfying itself that a case is both appropriate and ripe for accelerated process, as per § 15.03 (4)(i) regarding *"whether* the parties tried to informally resolve the dispute," is that here there may be an opportunity to incorporate the requirement at Section 15.04(3) "*that* [the parties *have in fact*] attempted in good faith to resolve their dispute." This point in the process would also be an opportunity to inform the Department of the requesting party's impression of the history and current stance of those attempts.

In considering the respondent's potential obligations in requesting expedited process, it may also behoove the Department to align the five-day request deadline, at § 15.03(3), with the seven-day Answer deadline, at § 15.05(4).

Lastly, terms such as "business issues" and "operational effects," § 15.03 (4) (e)(f) could produce more responsive filing if those concerns could be addressed within the other required elements, such as "legal analysis of position," in § 15.03(4)(b) refined for the purposes of this proposed process.

III. ALLOWING BIFURCATION OF DAMAGES ISSUES IS NECESSARY TO EFFECTIVE IMPLEMENTATION OF THE PROPOSED REGULATION

One clear factor potentially dissuading party-participants from using the Accelerated Docket might be the relative complexity of damages issues relative to the urgency of injunctive-type relief desired. An aggrieved party may be unwilling or financially unable to risk an expedited, and potentially poor resolution of its damages issues in the Accelerated Docket, at the expense of what would otherwise have been an appropriate and speedy resolution of the underlying claim. In those instances, a likely result in reluctantly waiving accelerated process because of this inability is an unnecessary, economically inefficient, and potentially devastating, to either or both parties (in the end), accrual of additional damages, than had the matter been resolved in equity in either party's favor through the accelerated process.

RNK strongly urges the Department to include in the proposed Accelerated Docket a mechanism for a complainant to voluntarily bifurcate the proceedings, postponing the issue of damages in pursuit of a declaratory judgment that would best mitigate

the mounting monetary losses, whichever party prevails. A logical place to introduce bifurcation would be, first in a non-binding section of the initial request for accelerated process, and then, should a complaining or responding party so choose, in the formal Complaint or Answer.

This bifurcation, while providing for prompt issue resolution, also provides notice regarding further accrual of costs, and benefits both parties: the first party being able to stop the potentially improper cost in the interim and, at resolution, whichever party prevails, either the opposing liable party or the first party benefitting from notice to cease and accumulating a large balloon payment. Providing for the prompt arrest of such market inefficiencies also benefits the industry, competition and the consuming public.

IV. THE REQUISITE TIME FRAMES UNDER THE PROPOSED REGULATIONS ARE POTENTIALLY INCONSISTENT AND DO NOT NECESSARILY PROVIDE ADEQUATE NOTICE

A. The Pre-Docketing Process Time Frames Would Benefit From Increased Internal Consistency

While Section 15.03(5) refers to a "20 day period," the ensuing language in Subsection (a)-(c) does not necessarily ensure adherence to an overall 20-day limit. Subsection (a) states that "[a]fter receipt of the request...," staff will convene a conference call, and subsections (b) and (c) appear to be intended to run sequentially from (a). However, unless the Department is required to convene the conference call within two days of the request, the call and receipt of documents following will not occur before the proposed "meeting" in Sub (c). To the extent that flexibility in the sequential process, *up to* a 20-day limit, was intended to afford the Department time to initiate the conference call, while still retaining the sequential outlay of call-documents-meetings, Subsection (c) would need rewording. Under the current wording, the "meeting" could occur before the conference call or production of documents, yet, if sequential, the entire process cannot last more than six days, rather than twenty.

B. The Parties Would Need Notice of The Initial Status Conference and Pre-Initial-Status Materials

Several paragraphs after references to pre-initial-status filings, the proposed regulations, §15.07(1), indicate that an initial status conference will be held "[n]ine

days after the answer is filed. There are then several types of filings and actions incumbent upon the parties to be completed two days before that date.

If the Department intends that every initial status conference will be held exactly nine calendar days after the Answer is filed, the filing deadlines "[t]wo days before" could be more useful if business days were specified. Otherwise, it would be helpful to the parties, instead, to have a conference date scheduled and noticed, preferably within two business days of the Answer filing, at, e.g., no sooner than seven, nor later than nine, business days, after the Answer. To the extent that substantial discovery and inter-party negotiation of, e.g., stipulations, would then be due, advance notice of the exact deadline would be crucial.

C. The Requirements under § 15.05(4) That the Parties File Statements on Discovery and Stipulations Issues at the Time of the Answer May Be Unduly Burdensome on Both Parties, Especially in Light of the Similar Requirements under §15.07(4) for Joint Statement of Discovery, Stipulations, and Issues, a Week Later

Before the receipt and review of the Answer, continuing negotiations between the parties are not likely to bear more fruit than the required pre-Complaint attempts at dispute resolution. Once both parties have set out their positions, they be better able to produce joint and separate statements of the disputed and agreed facts and issues. Even with the intent of maximizing settlement opportunities and overall speed of resolution, requiring the parties to be in a repeated or constant state of reiteration may have the opposite effect.

D. Additional Discovery Under §15.06(3)(4) Should Have Outside Time Limits

In the event that the Department allows additional or irregular discovery on behalf of either or both parties under §15.06(3)(4), there should be outside time limits within which such discovery must be completed. Accordingly and additionally, it may serve the Department in deciding whether to allow leave for or extended discovery to require a showing of timeliness balanced with probative value.

IV. SPECIFIC POINTS OF CLARIFICATION

- **§ 15.05(1)**: "If a matter is accepted for expedited review, the complainant *must* file its complaint... " appears to require a potential complainant to file a Complaint if the matter is accepted on the docket, regardless the posture of the matter. §15.05(4): The last two sentences would benefit from parallel construction with the several other places in the proposed

regulations which require such joint and separate statements.§15.06(1)(d)'s language, "Would not support the disclosing party's contentions.", seems overbroad. Perhaps the Department intends this clause to refer to documents which "tend to controvert or contradict the disclosing party's contentions, exculpate the opposing party."§15.06(2), last clause, regarding proposed expert witness testimony, requiring identification of the expert and "the subjects of the information." Perhaps the parties and the Department would be more informed by notice of "the intended contents and areas of testimony."

- § 15.08(4) refers to "the expert-disclosure requirements." If this term refers to the requirements of §15.06(5), it would be helpful to the parties to so state. If the Department intends to refer to other qualifying requirements, procedural or substantive, a reference thereto would similarly be helpful. §15.08(5): One of the page limits is defined as "single-spaced;" the others are not defined. By implied extension of one defined (single-spaced) parameter, the proposed regulations appear to permit this group of filings to be single-spaced; yet, it would be unconventional to entertain 20 pages single-spaced. Either way, clarification would be helpful.

- § 15.09: Here, the 52 day limit appears intended as calendar days as we agree would be appropriate. Conversely, other, shorter, time frames throughout the draft appeared to require "business days" counting. All might be specified "business" or "calendar" days.

- § 15.10: "Exceptions." RNK would strongly prefer that good cause for exceptions, not only be required but, be delineated in an albeit non-inclusive set of factors and parameters. While we agree it should be in the Department's discretion to grant exceptions, we also believe that it is in the best interest of all parties and the Department to have clear notice of circumstances which might be cause for exceptions to certain requirements. We agree there should be room in the regulations for the ongoing and case-by-case development of these instances, while at the same time, assuring and ensuring predictability, consistencies and parity across parties and across cases. Consistency would not only be necessary for fairness, but would assist the parties and the Department in formulating appropriate and efficient expectations about the prospects and procedural schedule of any one pending or contemplated case.

V. CONCLUSION

In sum, RNK strongly supports the adoption of an Accelerated Docket for dispute resolution in the telecommunications industry in Massachusetts. RNK advocates the adoption of the basic framework proposed by the Department, if some clarifications, limitations and consistencies can be effected in the final version.

Respectfully submitted,

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